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No. 80-2086

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners

v.

KNIGHTS OF THE KU KLUX KLAN,
REALM OF LOUISIANA, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM IN RESPONSE FOR RESPONDENT, KNIGHTS OF THE KU KLUX KLAN, REALM OF LOUISIANA

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MEMORANDUM IN RESPONSE FOR RESPONDENT, KNIGHTS OF THE KU KLUX KLAN, REALM OF LOUISIANA

Respondent, Knights of the Ku Klux Klan, Realm of Louisiana (KKK), was the prevailing party in obtaining preliminary and permanent injunctive relief in federal district court against petitioner, East Baton Rouge Parish School Board (School Board), and the U.S. Department of Health, Education and Welfare (HEW) pursuant to 42 U.S.C. §1983 and the First and Fourteenth Amendments of the U.S. Constitution. (Pet.App. A-1 to A-3.) Subsequently, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976 (Awards

Act), 42 U.S.C. §1988, the trial court awarded KKK $11,681.25 in attorney's fees and $239.16 in costs against HEW and refused to award any fees and costs against the School Board. (Pet.App. A-5.) The court of appeals reversed, holding that the Awards Act did not authorize awards of attorney's fees against the federal government and that the School Board was responsible for the fees and costs, to be determined on remand by the district court, because there were no "special circumstances" which would render such an award against the School Board "unjust."[1] (Pet.App. A-11, 15-17.) The court below rejected the School Board's contention that applying the Awards Act retroactively to the School Board would be "manifestly unjust." (Pet.App. A-17.)

QUESTIONS PRESENTED

The School Board's petition for certiorari seeks review of the following questions:

(1) Is the KKK, the prevailing party, entitled to an award of attorney's fees against the federal government?

(2) Did the court of appeals err in finding that there were no "special circumstances" which would render an award of attorney's fees against the School Board unjust?

(3) Did the court of appeals err in finding that retroactive application of the Awards Act against the School Board would not be "manifestly unjust"?

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1. 643 F.2d 1034 (5th Cir. 1981). HEW did not appeal the award of costs against the federal government. (Fed.Memo. 4. See also Pet.App. A-17.)

ARGUMENT

Question 1, whether fees should be awarded against the federal government, merits a summary reversal and remand to the district court for reconsideration in light of the Equal Access to Justice Act (Justice Act), Pub.L.No. 96-481, §§201-08, 94 Stat. 2325-30, effective October 1, 1981. Questions 2 and 3, whether fees should be awarded against the School Board, present nothing of merit to be reviewed.

1. If the Court is considering granting the writ application based solely on the issue of whether fees should be awarded against the federal government, respondent KKK would agree with petitioner that certiorari should be granted, but not on the basis of the Awards Act.[2] The issue is now controlled by the recently enacted Equal Access to Justice Act. This Act authorizes attorney's fees against the federal government in cases pending as of October 1, 1981. Justice Act §§204, 206.

A pending case would include those cases where a timely filed petition for certiorari was pending to review a decision of a court of appeals, as in this case.[3] The School Board effectively will be deprived of the benefits of this new Act unless the Court grants certiorari and reverses and remands.

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2. The Court recently denied writ applications on the issue of whether the Awards Act, as it existed prior to October 1, 1981, authorized fee awards against the federal government. **See NAACP v. Civiletti**, 609 F.2d 514 (D.C. Cir. 1979), **cert. denied** 447 U.S. 922, 100 S.Ct. 3012, 65 L.Ed. 2d 1114 (1980); **Shannon v. HUD**, 577 F.2d 854 (3rd Cir. 1978), **cert. denied** 439 U.S. 1002, 99 S.Ct. 611, 58 L.Ed.2d 677 (1978). Respondent KKK agrees with the federal respondent that because of the enactment of the Justice Act, "there is no need for the Court to consider the issue in the previous statutory context." (Fed.Memo. 6.)

3. **See Hutto v. Finney**, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522, 537 (1978); **Robinson v. Kimbrough**, 652 F.2d 458, 464-65 (5th Cir. 1981); **Corpus v. Estelle**, 605 F.2d 175, 177 (5th Cir. 1979), **cert. denied** 445 U.S. 919, 100 S.Ct. 1284, 63 L.Ed.2d 605 (1980); **Sethy v. Alameda Cty. Water Dist.**, 602 F.2d 894, 897 (9th Cir. 1979), **cert. denied** 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 731 (1980); **Rainey v. Jackson State College**, 551 F.2d 672, 675-76 (5th Cir. 1977). **See also Perzinski v. Chevron Chemical Co.**, 503 F.2d 654, 657 (7th Cir. 1974).

2. The petition discloses no special or important reasons for reviewing the factual determination below that there were not any "special circumstances" which would render an award of attorney's fees against the School Board "unjust." (Pet. App. A-15 to A-17.) The court of appeals found that it was "beyond dispute that, after almost three months to reflect upon the problem, the Board alone formulated and enforced the [school-use] policy that later was held unconstitutional."[4] (Pet.App. A-15.)

The School Board does not question the well-established rule that a prevailing party under the Awards Act "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[5] (Pet.10, 11.) Application of this principle has presented no problem to the courts of appeal.[6]

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4. The court of appeals also "noted that the School Board was not completely powerless to resist HEW's threats [to terminate federal funding if the School Board allowed KKK to use school facilities for a meeting]. Regulations promulgated pursuant to the Emergency School Aid Act in Title VI provide for administrative procedures incident to the termination of federal funding." (Pet.App. A-16, fn. 14.) **See also** 45 C.F.R. Parts 16, 80, 100-49, §185.45.

5. S.Rep. No. 94-1011, 94th Cong. 2d Sess. 5 (1976), **quoting Newman v. Piggie Park Enterprises, Inc.**, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968); **Supreme Court of Virginia v. Consumers Union**, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641, 657-58 (1980).

6. **See e.g. Harrington v. DeVito**, 656 F.2d 264, 268 (7th Cir. 1981); **Milwe v. Cavuoto**, 653 F.2d 80, 82-4 (2d Cir. 1981); **Robinson v. Kimbrough**, 652 F.2d 458, 467 (5th Cir. 1981); **Bonnes v. Long**, 651 F.2d 214, 218-19 (4th Cir. 1981); **Teitelbaum v. Sorenson**, 648 F.2d 1248-51 (9th Cir. 1981); **Bond v. Stanton**, 630 F.2d 1231, 1234 (7th Cir. 1980); **Aware Woman Clinic, Inc. v. Cocoa Beach, Fla.**, 629 F.2d 1146, 1148-50 (5th Cir. 1980); **Riddell v. National Democratic Party**, 624 F.2d 539, 544-45 (5th Cir. 1980); **Love v. Mayor, City of Cheyenne, Wyo.**, 620 F.2d 235, 236 (10th Cir. 1980); **Northcross v. Board of Education of Memphis City Schools**, 611 F.2d 624, 635 (6th Cir. 1979); **Pickett v. Milam**, 579 F.2d 1118, 1121 (8th Cir. 1978); **Brown v. Culpepper**, 559 F.2d 274, 278 (5th Cir. 1977). The only apparent conflict in the circuits is whether "good faith" of the parties is one of the elements of "special circumstances" or whether good faith is not a "special circumstance" at all. Recent decisions of the Court indicate good faith is not a special circumstance to be considered in denying a fee award. **See Mahoning Women's Center v. Hunter**, 447 U.S. 98, 100 S.Ct. 3006, 65 L.Ed.2d 1110 (1980), **vacating and remanding** 610 F.2d 456 (6th Cir. 1979); **New York Gaslight Club, Inc. v. Carey**, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980); **Supreme Court of Virginia v. Consumers Union**, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641, 657-58 (1980).

The petition does not disclose any facts which would exculpate the School Board from liability for attorney's fees. At best, the petition seeks to implicate HEW in the formulation and ultimate adoption of the School Board's blatantly unconstitutional school-use policy. The School Board's contention that it would never have adopted the school-use policy except for the intervention of HEW (Pet.13), ignores the undisputed fact that HEW never requested that the School Board adopt any type of school-use policy. The School Board was not under a deadline to adopt the policy and could have chosen not to adopt any policy at all. Instead, the School Board considered the matter for almost three months and finally decided to adopt a policy which was patently unconstitutional. Since the court below found as an undisputed fact that this decision was solely that of the School Board (Pet. App. A-16), the Board must bear responsibility for its policy and cannot shift responsibility to HEW or anyone else who may have merely influenced the School Board in making its decision. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641, 657-58 (1980); *Johnson v. State of Mississippi*, 606 F.2d 635 (5th Cir. 1979).

3. The School Board does not question the well-settled law that "the legislative history of the Awards Act authorizes retroactive fee awards unless such an award would be 'manifestly unjust'."[7] (Pet.App. A-16.) Instead, the School Board seeks a review of this principle as applied to the facts of this case. However, there is nothing to review because the court of appeals found that the School Board "has not

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7. **Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); Universal Amusement Co., Inc. v. Vance, 559 F.2d 1286 (5th Cir. 1977), cert. denied 442 U.S. 928, 99 S.Ct. 2857, 61 L.Ed.2d 295 (1979); Beazer v. New York City Transit Authority, 558 F.2d 97 (2d Cir. 1977); King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977), cert. denied 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977); Verrilli v. City of Concord, 557 F.2d 664 (9th Cir. 1977); Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977).**

attempted to demonstrate how retroactive application of the Awards Act would be more burdensome or unfair in this case than it would be in any other." (Pet.App. A-17.) The petition discloses no facts contrary to this determination by the court of appeals.

Furthermore, as noted by the federal respondent, the decision of the court of appeals on the School Board's liability is interlocutory because this case was remanded for a determination of "what amount, if any, of attorneys' fees reasonably may be assessed against the Board." (Pet.App. A-17.)

CONCLUSION

Therefore, it is respectfully submitted that as to Question 1, whether attorney's fees should be awarded against the federal respondent, certiorari should be granted and the Court should summarily reverse and remand this case to the district court with instructions to determine an award of attorney's fees against the federal respondent in conformity with the new Justice Act. As to Questions 2 and 3, whether assessment of fees against the School Board was appropriate, it is respectfully submitted that petitioner has failed to raise a serious or substantial issue to be reviewed by the Court and certiorari should be denied as to these questions.

Respectfully submitted,

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